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fence, or occasionally appear as their accusers. The literary performances, which lie upon the lady's toilet, are produced by way of reference; and passages are read aloud, which serve to refute or to corroborate an opinion already advanced. The lady sometimes takes her seat at a side-table, and overlooks favorite musical compositions. An elegant supper is served up at eleven, and about midnight the company break up.

'In such harmless amusements a family day is consumed. It may well be conceived, however, that this arrangement is liable to many interruptions;—when an illustrious visiter is expected, when the master of the house makes a rural excursion, or when he follows the chase.'

ART. IV.—*A Collection of Cases overruled, doubted, or limited in their application. Taken from American and English Reports. By Simon Greenleaf, Counsellor at Law.* Portland, 1821.

THE number of cases in this collection is nearly six hundred. Still it is by no means complete. Our own recollection and minutes furnish at least one hundred more; and it is probable that the full number of such cases, in American and English Reports, is one thousand. This statement may surprise some of our readers, and give occasion for new jests about the glorious uncertainty of the law. If, however, the number of reported cases, and the series of years during which they have accumulated, are considered, it will not be deemed strange or unfortunate, that a thousand legal errors have been corrected in half as many years. There are about four hundred volumes of cases decided in England and Ireland, since the reign of Edward II. We, of course, do not include in this estimate the broken cases of elder times, which may be gleaned from the old abridgments, and which reach back to the days of Henry III, nor the numerous little volumes containing accounts of a single case. There are also about one hundred and forty volumes of American Reports, all published since the organization of the federal government, and four fifths of them within the last twenty years.

That in all the courts in England and Ireland, with such extent of jurisdiction and press of business, there should be an average of two errors of judgment in a year, is surely no just cause of wonder or alarm. But our assumption, that there are

a thousand cases, which might be inserted in a collection like Mr Greenleaf's, included the American as well as the English decisions. Of course, the proportion of errors, on that assumption, is less than we have above supposed, for that our own official jurisconsults are infallible, we have not the vanity to believe, nor they the folly to pretend. Besides, there are in this collection, not only decisions, which have been overruled, but those, also, of which, while the general principle is adhered to, the extent of its application only has been subsequently limited, and others which have been merely doubted. Again, many of these overruled cases are judgments, which have been reversed in the higher tribunals, and therefore ought not to swell the list of errors; as such judgments are annulled, and never cited or regarded as authorities. That more errors have not been corrected is a cause of regret and humiliation. An *index expurgatorius* is needed for many a volume of reports. It has perhaps been true throughout the history of the English law, that judges have been less reluctant to correct the errors of their predecessors, than their own; but it is peculiarly true of American judges. It is, however, with admiration of the magnanimity, which attends great talents and thorough learning, that we have witnessed, on more than one occasion, a full and voluntary retraction of his own judicial opinion, by a most distinguished jurist of our own country, whose official labors we have heretofore noticed, and to whose powers and acquisitions we have paid our sincerest homage. 'True wisdom,' says another great judge, 'should induce us all to retrace our steps where we are wrong, and not for the sake of consistency persist to hold our adjudications to be oracles of the law. Judges are not infallible; and from a thousand causes their adjudications are sometimes erroneous. Great talents induce them, on some occasions, to repose too much on themselves. They feel that their contemporaries will be slow to doubt whatever they decide. But in a short time their decisions will be discussed by their weight, and not by their mere authority.' The truth and justness of this *last* remark are daily before our eyes; and the wisdom recommended in the *first*, is exemplified in the practice of the author. It is humiliating and pitiable to see a judge cling to his errors with a convulsive grasp, and search for strained and darksome analogies to fortify his blunders; denying the wisdom, while he half admits the existence of the doctrine which

he combats, and questioning the sagacity of the most accomplished jurists of the age. If this is ever seen, it is in men of little minds and small acquirements. The pride of infallibility belongs only to such.

The law is a progressive science; and 'all rational sciences that are subject to argument and discourse,' says sir John Davis, 'must needs be subject to uncertainty and to error. Howbeit, there is no art or science that standeth upon discourse of reason, that hath her rules and maxims so certain and infallible, and so little subject to divers interpretations, as the common law; so certain, sure, and without questions, are the principles and grounds thereof.'—'If the rules and maxims of the law were a thousand times as many as they be indeed, yet would they carry no proportion with the infinite diversity of men's actions, and of other accidents which make the cases that are to be decided by the law. Besides, it must be a work of singular judgment to apply the grounds and rules of the law, which are fixed and certain, to all human acts and accidents, which are in perpetual motion and mutation.'—'But for all this, it is objected that our later judgments do many times cross and contradict the former directly in one and the same point, which is a manifest argument of incertainty in the law. Assuredly, there are very few precedents of such contrary judgments—scarce two in one age. And yet if the reasons of the later judgments did appear of record, we should find them grounded upon mischiefs and inconveniences arising since the former judgments, or upon other weighty considerations respecting the good of the commonwealth in general.'—'And thus much may suffice to be spoken, to remove that scandal of uncertainty which ignorance doth unworthily cast upon the common law.'

Contrary judgments, 'in one and the same point of law,' are as rare in these days, as in the times referred to by the learned Attorney General of Ireland. An inspection of the cases collected by Mr Greenleaf will shew, that in a great majority of instances, it is only an incidental *dictum* of a judge that has been denied or limited in its application. The cases are few, in which the very point in judgment has been afterwards decided in a different manner. Lord Coke says, that in all his time there were not two questions moved, touching any of the fundamental points of the common law. Sir John Davis says, exchequer-chamber cases were so rare in his day, that the judges were drawn out of their proper

courts scarce twice in a year to deliver their opinions on those doubtful points. And it is asserted by chancellor Kent, that according to Colle's and Brown's parliamentary reports, which have collected all the cases to be found, there were from the year 1697 to the year 1778, (a period of eighty years, and that too the most happy and flourishing in the English history,) only sixty-four cases in error brought to a hearing in the House of Lords. In a small number only of these cases was there a reversal of judgment. In Shower's Parliamentary Reports of an earlier period, there are thirty-seven cases, and but seven reversals.

The facility of appealing from one tribunal to another, which is furnished by the statutes of the United States, and of the several states, has a direct and fatal tendency to impair confidence in the subordinate courts, to foster a litigious spirit, and to impress the minds of suitors, and of the people at large, with the notion that there is no certainty in the law. To the honor of the common law, it should be sounded in every ear, that *an appeal* is not known in that system. 'Upon judgments given in our ordinary courts of justice,' says an ancient sage, 'the law doth admit and allow *writs of error* to be brought, without any touch or dishonor to the judges.' To a more litigious spirit than prevailed in earlier days may perhaps be, in part, ascribed the more numerous writs of error, which are now brought into the House of Lords. In part, too, it may be attributed to the increase of important questions, which originate in the other courts, from a more numerous population, more extended business, and new relations, produced by political changes.

Upon a comprehensive survey of the subject, we shall find cause rather for exultation in the stability and certainty of the law, than for wonder or regret at the occasional conflict of judicial decisions. The causes of the greater diversity of decisions in this country, than in England, are obvious to the most superficial notice. Each state in the Union has its own courts, that are subject to no common revision, except upon national or constitutional questions; and those courts are composed of men of very unequal talents, experience, and learning. On questions of common law, therefore, we must expect there will always be contradictory adjudications by the courts of the different states. There is little or no hope of an uniform national common law. Ancient usages are

different in states which are contiguous, and still more widely different in those which are remote from each other. In every state, statutes have altered the common law, but not in the same particulars in any two of them. In some, the doctrines of chancery are incorporated with the common law; in others, they are kept distinct. For these and numerous similar reasons, we cannot anticipate (perhaps we ought not to desire) the uniformity which distinguishes the administration of the common law in England. In each state, however, and especially in Massachusetts, for which the suggestion is intended, additional securities might be furnished for the stability and certainty of the law. We ought to derive wisdom for future use, from the experience of the last seventeen years, and not sit down contented with past and present good. While the law, or the administration of it, is susceptible of improvement, it ought not to retrograde nor remain stationary. Reports of adjudged cases are called by Bracton *the judgments of the just.* Until 1805, the few reports of legal decisions, which were published in this commonwealth, consisted principally of hasty opinions on half-argued points that were raised in the progress of jury trials. Are the reports of such decisions, by whomsoever made, entitled to this high appellation? Since 1805, law-terms have been held in the several counties, and the advantages have been immense. The junior part of the profession can never duly estimate them; though from the first volume of Massachusetts Reports, they can learn a part of the evils from which they are exempted. In our judgment, however, the system so happily commenced is not half finished. In a word, we believe there ought to be only two places at which law-terms should be held, at Boston and in the interior; and that all legal questions ought to be argued thoroughly, and considered maturely, before they are decided. We are aware of the objections of delay and expense; but a tardy decision is better than a wrong one, and nothing is more manifest than the impolicy and mischief of making litigation cheap. We do not admit, however, nor believe that the change we propose would produce delay. On the contrary, we are certain that it would produce greater despatch, and earlier decisions. The calm and settled attention of eight weeks is sufficient for the determination of any earthly question, but the hurried glance of an evening or two, on the circuits, affords no ade-

quate means of correctly deciding important and intricate causes. They, of course, are continued for months, under the present system, for the purpose of allowing to the court the means, which we propose to furnish in all cases. Nor need the expense be more burdensome to suitors, than it is at present. The legislature can guard this point.

As several decisions reported by Mr Tyng have already been overruled, we trust it is not indecorous to intimate that there may be several others which would not have been made, had the causes been more fully argued, and more maturely considered. And we know of no method so eligible as that which we have above suggested, to ensure full investigation by the bar and the bench. It is not true, as is too often supposed, that the court only are responsible for incorrect adjudications. It is often the fault of counsel, as might easily be shown, and as every lawyer will admit. The bar was instituted to assist the court, and whenever the proper assistance is withheld, the bar is false to its trust. The reputation of the profession, in Massachusetts, is deeply concerned in the plan that we have proposed. They will not be scandalized by the suggestion, that the Reports do not present them, as a body, so prominently, either in point of learning or accumen, as to cause exultation when compared with the bar of some other states, as they are exhibited by their own reporters. This, we fully believe, is the effect of the present system, under which questions are often submitted for the sake of despatch, or to avoid labor, without argument, or at best but carelessly and superficially discussed. In such cases, superior legal attainments are without use and without reward. But we will not at this time pursue these remarks further.

An earnest wish for the advancement of our jurisprudence, and an unalterable persuasion that the plan we have suggested is one of the easiest, and most obvious to effect it, have elicited these few suggestions. It is time a distinction was made, broad and everlasting, between the trade and the profession of the law.

It has sometimes been thought that certainty in statute law might be promoted by reducing all that has been enacted upon one subject, though at distant intervals, into one chapter. We trust the ill success of such attempts will prevent their repetition. The present Probate Law of Massachusetts is a

standing, monitory memento on this subject, and justifies the following sensible and modest suggestion in the advertisement to Foley's Poor Laws.—'It has been for some time proposed to reduce all the laws relating to the Poor into one. But I humbly submit it to better judgments, whether it would not be more advisable to retain our old laws, whose sense and meaning have been determined by various decisions, and to go on making supplemental acts, where these are found defective, than to run the hazard of a new one, which perhaps may be liable to as many misconstructions as the former have already gone through.'

Two very recent decisions, one in the court of king's bench, the other in the supreme court of Massachusetts, on the construction of the statute of frauds and perjuries, strongly evince the different effect, on different judges, of doubts strongly expressed and often repeated. At the very time that the court in England unanimously held that all the doubts concerning the decision in *Wain* vs. *Warlters*, 5 East 10, were idle and not to be regarded, the court in Massachusetts denied that decision, and anticipated its reversal whenever it should be again brought directly into judgment in the court where it was made.

Mr Greenleaf informs us, in the advertisement prefixed to his book, that the present edition is a very small one, and intended chiefly, as it would seem, 'to obtain the judgment of the profession as to the utility of the work and the manner of its execution, and their aid, in augmenting the collection, should this attempt be favourably received.' Of the utility of the work there can be but one opinion. A manual, which should present at a glance, or furnish the means of readily ascertaining what has been repudiated, denied, doubted or limited in its application, in the voluminous and evergrowing volumes of judicial decisions, has long been a desideratum. It is obviously, however, a work which no single hand can rationally hope to render complete. The aid of the profession is therefore wisely solicited, and we hope will be liberally imparted. For accomplishing so much, Mr Greenleaf is entitled to great credit.—In the execution of the work, we find one great fault, which we doubt not will be corrected in a future edition. The point overruled, doubted, or limited in its application, is frequently omitted. This omission occurs seven times in the second page of the book. Thus: '*Anonymous* Sav. 70. pl. 145. Overruled in *Doe* vs. *Redfern*, 12

East 113.' A reader who is destitute of Savile's and of East's reports would derive no benefit from this information, and if he possessed both, he ought not to be obliged to examine them to ascertain what Mr G. states to have been overruled. We have noticed some *errors in fact*, but they are extremely few. In the 67th page, the case of *the king* vs. *Young & Glennie*, 2 Anst. 448, is said to be overruled by by that of *Iggulden* vs. *May*, 2 N. R. 452, and by other cases which have not the slightest bearing upon it. This may be a typographical error. We know of no case that overrules that of *the king* vs. *Young & al.* We believe it to be sound law, and confirmed by subsequent decisions. See 3 Anst. 811, 2 Taunt. 254, and several cases in Virginia. Mr G. may have supposed 6 D. and E. 766, impugns it.

We trust Mr Greenleaf will shew us, in a future edition, the differences in the decisions of different states on the same question. This might be done with small labor, and would greatly enhance the value of the work. For instance, that in New York and New Hampshire, the officer who presides at a popular election is not answerable for rejecting the vote of a qualified elector, unless he acts maliciously or corruptly. In Massachusetts the contrary is determined. The departures from the common law of England, in the different states, might also be added without more labor than the addition would repay. Indeed there is in the present edition some information of this kind, but it is not so full as is desirable.

'The law,' says lord Hardwicke, 'does not consist of particular instances only; but in the reason which runs through and governs those cases which have been determined.' A single judgment, therefore, should not disincline the court to review their first resolutions; much less should it present a bar to subsequent discussion. *Optima legum interpres est res perpetue similiter judicata.* The freedom and intrepidity of Mr Bacon Wood, as displayed in Wightwick's reports, are worthy of all commendation. Mr Greenleaf will have rendered to his profession a most eminent service, if by presenting so many examples of corrected error, he shall induce his brethren to examine decisions without fear, and the courts to revise them without reluctance.

nothing more. Not even his natural scenery, wild, romantic, sublime, possibly a true copy of the particular spots it represents, can be said to possess the peculiar characteristics of America; and with him the aboriginal savage moves to his fell purpose, not as the real warrior of the wilderness, but a mere fiendlike instrument of death.—The graceful and humorous author of Knickerbocker and the Sketch Book, we regret to say, has not yet permitted us to view him threading the mazes of romance; and when we have named these, we know not who else there is to enter into competition with our author for the palm as an American novelist. We hope to hear from him again—not too soon. We do not exactly.

'drop in unwilling ears
This saving counsel—keep your piece *nine years*,'

But we protest most seriously against modern rapidity of production; and really beg that he will be so good (for it is a virtue now a days,) as just to write his book before he prints it; and it would do no harm if he were to read it over once into the bargain.

ERRATA.

Page 71. 12th l. from bot. for 'voluminous,' *read* 'numerous.'
—— 72. 6th l. ——— — 'Mr Bacon Wood,' *read* 'Mr Baron Wood.'